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IN THE

Supreme Court of the United States

OCTOBER TERM, [redacted] 1969

No. [redacted]
181

CECIL E. SHIFFLETT, ET AL.,

Petitioners,

v.

EDWARD MINOR, ET AL.,
CONWAY ROBINSON, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

RICHARD D. PAYNE,
26 W. Pennsylvania Avenue,
Towson, Maryland,
For Petitioners.

The Daily Record Co., Baltimore, Md. 21203

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IN THE

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OCTOBER TERM, 1968

No. ------

CECIL E. SHIFFLETT, ET AL.,

Petitioners,

v.

EDWARD MINOR, ET AL.,
CONWAY ROBINSON, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Court of Appeals of Maryland, entered January 15, 1969, Motion for Reargument denied March 3, 1969, in the cause of *Edward Minor, et al; Conway Robinson, et al. v. Cecil E. Shifflett, et al.*[1]

[1] Petitioners:
Cecil E. Shifflett
Raymond L. Shifflett
Betty A. Shifflett
Gilbert K. Shifflett and
Fannie M. Shifflett (Intervenors)
Respondents:
Edward Minor and Terese K. Minor, his wife and
Clarence W. Martin and Eutha I. Martin, his wife
Conway Robinson
J. Austin Deitz
Nicholas Waltemeyer
Wesley Quail

CITATIONS TO OPINIONS BELOW

The Opinion of the Zoning Commissioner of Baltimore County (unreported) is printed in Appendix A, *infra*, p. 1a. The Opinion of the Board of Zoning Appeals of Baltimore County (unreported) is printed in Appendix A, *infra*, p. 1a. The Opinion of Honorable John N. Maguire, Circuit Court for Baltimore County (unreported) is printed in Appendix A, *infra*, p. 8a. The Opinion of the Court of Appeals of Maryland, printed in Appendix A, *infra*, p. 12a, is reported in 252 Md. 158, 249 A. 2d 159 (1969); the Motion for Reargument (denied by that court on March 3, 1969) is printed in Appendix A, *infra*, p. 27a.

JURISDICTION

The judgment of the Court of Appeals of Maryland was entered on January 15, 1967. Rehearing was denied on March 3, 1969, see Appendix A, p. 41a. On March 3, 1969, the Court of Appeals of Maryland issued a stay of its mandate pending the filing of this Petition for Writ of Certiorari, see Appendix A, p. 42a. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1257.

QUESTIONS PRESENTED

1. When a property owner has enjoyed the use of his property for thirty years until the passing of a zoning ordinance extinguishing his vested right to that use, does a decision by the Court of Appeals of Maryland reversing lower administrative and judicial rulings that the property owner may continue said use deprive the property owner of his property without due process of law under the 14th Amendment of the United States Constitution?

2. Whether a Maryland decision interpreting a local ordinance, which has the effect of denying or unreasonably curtailing the common right to engage in a lawful private

business is unconstitutional as being a violation of the 14th Amendment to the United States Constitution.

3. Whether a Maryland county zoning ordinance is in violation of the Petitioner's rights under Article I, Section 10 and Amendment 14 to the United States Constitution if it commands a Petitioner to discontinue, within two years, use of his land for a junk yard, notwithstanding said use has lawfully continued for three decades and represents a substantial investment.

4. Whether the Court of Appeals of Maryland test for determining the legality of local zoning, called the "Change or Mistake Rule" is unconstitutional in that its application to the Petitioner deprives him of due process and of equal protection of the laws under the 14th Amendment of the United States Constitution.

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE RULES INVOLVED

The case involves the following:

1. A portion of the Article I § 10 of the Constitution of the United States making restrictions upon the powers of the states.

> "No state shall enter into Any Treaty. Alliance, of Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility. . . ."

2. Section 1 of the 14th Amendment to the Constitution of the United States:

> "All persons born or naturalized in the United States and subject to the Jurisdiction thereof, are citizens of

the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE AND HOW THE FEDERAL QUESTION IS PRESENTED

In 1962, Baltimore County Zoning Ordinance Sec. 200.16 was enacted (Apx. 42a) providing in substance that in the future all persons who had, until then, legally operated junk yards in residential areas could no longer do so. Violation of this ordinance is punishable by fine and imprisonment under Section 503, Baltimore County Zoning Regulations (Apx. 45a). Under Sec. 200.16, the Petitioners, who have been in the junk yard business since 1932, thirteen years before Baltimore County had zoning, would have had to give up their livelihood unless the property was granted a special exception. The Special Exception was applied for to the Baltimore County Zoning Commissioner, who denied it. Upon appeal to the Baltimore County Board of Appeals, the Special Exception was granted (Apx. 1a). The Respondents appealed to the Circuit Court for Baltimore County which affirmed the Board, thereby permitting the Petitioners to continue in their life-long business (Apx. 8a).

On Appeal to the Court of Appeals of Maryland, this decision was reversed (Apx. 12a). However, in a reluctant concurrent opinion, Judge Barnes of that court lamented the decision of the court as being founded on an erroneous and unconstitutional basis, and that the Petitioner had been denied due process of law.

The denial of Petitioners' constitutional rights was not raised at the trial level or appeal level because those rights had not been infringed until the decision of the Court of Appeals of Maryland. Petitioner requested the Court of Appeals of Maryland for an opportunity to reargue the appeal (Apx. 27a) with specific regard to the constitutional issues, but was denied. This was the first stage, *a fortiori*, where constitutional issues were raised, which Petitioner suggests is sufficient to confer jurisdiction upon this Court under *Grannis v. Ordean*, 234 U.S. 385, 58 L. ed. 1363, 34 S. Ct. 779 (1914); *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 258, 17 S. Ct. 992, 41 L. ed. 994.

THE REASONS FOR GRANTING THE WRIT

The Petitioners are hard working, God-fearing (not presently in vogue) Americans who have made a living in the junk yard business for their families and employees for almost four decades. Their business existed at the present location in Baltimore County, Maryland, for thirteen years before there was any zoning there. Through hard work the Petitioners have built the business into a $300,000 investment with a payroll of $60,000 per year. Suddenly, an ordinance was passed by the Baltimore County Council which said that Petitioners can no longer pursue their livelihood. Under the terms of the ordinance in the future it will be unlawful for Petitioners to use their land for a junk yard, ostensibly because it is in the public interest not to have junk yards in Baltimore County, Maryland. Not only is the vested right of Petitioners to use their land and conduct a lawful business taken away, but Petitioners have not been compensated for this taking.

The Petitioners' problem is not a new one, but it is part of a vanguard of cases dealing with a new and growing method of free taking for public use all over this country.

State and local governments, instead of using their power of eminent domain, have found it more economical to use zoning ordinances to deprive people of the use of their property. *McInness v. McKay*, 141 A. 2d 699, 127 Me. 110, affirmed 49 S. Ct. 344, 279 U.S. 820, 73 L. ed. 975 (1928).

This case presents to the Court an example of the most flagrant abuse of the power of zoning which, if sustained, will remove all barriers to cities and counties in Maryland, as well as local governments throughout the Nation, for the arbitrary condemnation of private enterprise and private property without payment by the technique of zoning property out of use.

The decision of the Court of Appeals of Maryland violates the Petitioners' rights under the United States Constitution for the following reasons:

First: The court's decision is based on the erroneous assumption that Baltimore County Zoning Ordinance 200.16 is constitutional. The petitioner concedes that there are cases which have held, over vigorous dissent, that zoning ordinances of the variety complained of here are constitutional. *Livingston Rock & Gravel Co. v. County of Los Angeles*, 43 Cal. 2d 121, 272 P. 2d 4; *City of Los Angeles v. Gage*, 127 Cal. App. 2d 442, 274 P. 2d 34; *Standard Oil Co. v. City of Tallahassee*, 183 F. 2d 410 (5th Cir., 1950), certiorari denied 340 U.S. 892, 71 S. Ct. 208, 95 L. ed. 647; *Spurgeon v. Board of Com'rs of Shawnee County*, 181 Kan. 1008, 317 P. 2d 798; *Grant v. Mayor & City Council of Baltimore*, 212 Md. 301, 129 A. 2d 363; *Harbison v. City of Buffalo*, 4 N.Y. 2d 553, 176 N.Y.S. 2d 598 (1958); *State ex rel. Dema Realty Co. v. Jacoby*, 168 La. 752, 123 So. 314; *State ex rel. Dema Realty Co. v. McDonald*, 168 La. 172, 121 So. 613, certiorari denied 280 U.S. 556, 50 S. Ct. 16, 74 L. Ed. 612; *Robinson Brick Co. v. Luthi*, 115 Colo. 106, 169 P. 2d 171,

166 A.L.R. 655; *City of Corpus Christi v. Allen*, 152 Tex 137, 254 S.W. 2d 759; *Stoner McCray System v. City of Des Moines*, 247 Iowa 1313, 78 N.W. 2d 843; *United Adv. Corp. v. Borough of Raritan*, 11 N.J. 144, 93 A. 2d 362).

However, there is likewise a body of state law holding that such confiscation is unconstitutional; see *O'Connor v. City of Moscow*, 69 Idaho 37, 202 P. 2d 401, 9 A.L.R. 2d 1039; *City of Akron v. Chapman*, 160 Ohio St. 382, 116 N.E. 2d 697, 42 A.L.R. 1146; *James v. City of Greenville*, 227 S.C. 565, 88 S.E. 2d 661; *City of Corpus Christi v. Allen*, 152 Tex. 137, 254 S.W. 2d 729, affirming Tex. Civ. App., 247 S.W. 2d 130; *Town of Somers v. Camarco*, 308 N.Y. 7, 127 N.E. 2d 327.

It is submitted, therefore, that one of the primary reasons to grant this writ is to once and for all settle the question of the constitutionality of zoning ordinances of the type complained of here. It is submitted that such a determination will insure nationwide uniformity. It will also prevent the continuation in Maryland of the anomalous situation of allowing a perfectly legitimate business enterprise to exist in one county of a state while the existence of such business in another county is a violation of the law.

The ordinance and its application are unconstitutional also because it has the effect of denying and unreasonably curtailing the right of the Petitioner to engage in a lawful private business in violation of the 14th Amendment of the United States Constitution. In essence, the decision of the Court of Appeals of Maryland denies the Petitioners the right to operate a legitimate business in one Maryland county although competitors in other Maryland subdivisions are not prohibited from engaging in the same business. *New State Ice Company v. Liebmann*, 285 U.S. 262, 52 S.Ct. 371, 76 L. ed. 747 (1932); *Liggett Co. v.*

Baldridge, 278 U.S. 105, 49 S.Ct. 57, 73 L. ed. 204 (1928). Naturally, if there were some overwhelming public need for the prohibition of this business perhaps its elimination might be sustained. However, it has been long settled in Maryland that a junk yard does not create a nuisance per se. *Town of Bladensburg v. Berg,* 216 Md. 282, 139 A. 2d 703 (1958). The record clearly shows that Petitioners' junk yard harms no one (Apx. 23a). It is submitted that to deprive Petitioners of the right to operate a business which they have been doing for over thirty years without any reason and without any compensation for losses is an unconstitutional and unjust taking for public benefit.

The ordinance is unconstitutional also because it violates Art. I, §10 of the United States Constitution. It impairs the obligation of contracts and operates as "constructive" ex post facto law.

The ordinance clearly impairs the obligation of contracts in that Petitioners, under the threat of criminal sanctions (Apx. 45a) can no longer contract and enter the agreements common to Petitioners' business notwithstanding the fact that such business can lawfully be conducted elsewhere in Maryland and other states. *Edwards v. Kearzey,* 96 U.S. 595, 24 L. ed. 793 (1877); *State of La. v. City of New Orleans,* 102 U.S. 203, 26 L. ed. 132 (1880); *Connecticut Mut. Life Ins. Co. v. Cushman,* 108 U.S. 51, 2 S.Ct. 236, 27 L. ed. 648 (1882); *Allgeyer v. State of Louisiana,* 165 U.S. 578, 17 S.Ct. 427, 41 L. ed. 832.

It is also suggested by Petitioners that this zoning ordinance operates as an ex post facto law. The Petitioners admit that the ordinance does not make actions which were legal when committed actionable crimes now, but that it simply declares that what was legal before shall

henceforth be illegal. In this respect, it does not come within the classical definitions of an ex post facto law. However, Petitioners suggest that the overall impact of the ordinance amounts to a *constructive* ex post facto law because it makes conduct which is universally legal and proper a crime in the future. Said ordinance was promulgated under circumstances whereby the now proscribed conduct has been carried on and built up for years and is truly incapable, without total destruction of the Petitioners, of being stopped in time to avoid the change of the classification of the conduct from lawful to unlawful. An analogous situation would be: (a) an ordinance making the cutting down of walnut trees unlawful in Baltimore County effective two years hence, notwithstanding that people in the walnut tree growing business planted and cultivated walnut trees for their livelihood 30 years ago and said trees are scheduled to be ripe for cutting 4 or 5 years hence; (b) an ordinance that makes the taking of a certain drug which in the past has been lawful, a crime two years hence, notwithstanding that there exist people who are ill, but can be cured if they take said drug for three years. Here the Petitioners have engaged in a perfectly legitimate business for thirty years, during which time they have built up the business to a profitable level. Suddenly they are advised that what was once lawful shall henceforth be unlawful, ostensibly for some nebulous public benefit. However, the Petitioners shall not be compensated for the loss they will sustain. Unquestionably, the Petitioners here are being punished for past conduct because had they not built the business, there would not be a junk yard to eliminate.

The effect on the Petitioners of the decision of the Court of Appeals of Maryland on the constitutionality of the zoning ordinance and its application is best summarized

by Chief Judge Hutcheson in his dissenting opinion in *Standard Oil Co. v. City of Tallahassee, supra,* at page 413:

> "In view of the decision in Standard Oil Co. v. Bowling Green, 244 Ky. 362, 50 S.W. 2d 960, 86 A.L.R. 648 and of the two decisions of the Supreme Court of Florida, relied on by appellant and decided since the decision of this case below, in all of which the court, recognizing that even in this age of enlightenment the Constitution still protects the citizen against arbitrary and unreasonable action, I am in no doubt that in sustaining this admittedly confiscatory ordinance, a good general principle, the public interest in zoning, has been run into the ground, the tail of legislative confiscation by caprice has been permitted to wag the dog of judicial constitutional protection" (Citation omitted).

Second: The Petitioners' rights under the 14th Amendment of the Constitution have been abridged by the failure of the Court of Appeals of Maryland to test the action of the Baltimore County Board of Zoning Appeals by determining whether it was "arbitrary, unreasonable and capricious." Instead, the Court of Appeals tested the administrative action of the Zoning Board by applying its own "change or mistake rule" thereby denying the Petitioners of due process and equal protection of the laws.

In Maryland, it has been consistently held that the courts are without authority to interfere with decisions of an administrative agency unless said decisions are "arbitrary, unreasonable or capricious." *Snowden v. City of Baltimore,* 224 Md. 443, 168 A. 2d 390 (1961); *State Board of Registration for Professional Engineers and Land Surveyors v. Ruth,* 223 Md. 428, 165 A. 2d 145 (1960); *Nuger v. State Ins. Commissioner,* 238 Md. 55, 207 A. 2d 619 (1965); *Kaufman v. Taxicab Bureau, Baltimore City Police Dept.,* 236 Md. 476, 204 A. 2d 521 (1964), cert. den. 382

U.S. 849, 86 S.Ct. 95, 15 L. ed. 2d 88; *Robertson v. County Board of Appeals for Montgomery County*, 210 Md. 190, 122 A. 2d 751 (1956); *Bosley v. Quigley*, 189 Md. 493, 56 A. 2d 835 (1948).

However, in the area of zoning, the Court of Appeals of Maryland applies a different test which has commonly been referred to as the "change or mistake rule." In *MacDonald v. County Board*, 238 Md. 549, 210 A. 2d 325 (1965), the dissenting opinion of Judge Barnes traces the history of this test at page 576:

> "The majority states, in effect, that rezoning can only be sustained when there is 'strong evidence of mistake' in the original zoning or where there is 'a substantial change in conditions' in the neighborhood. This 'mistake-change in conditions' rule came into the Maryland law by way of *dicta* of our predecessors and in a rather oblique way. The 'change in conditions' concept seems to be first stated, without any supporting authority, in *Northwest Merchants Terminal v. O'Rourke*, 191 Md. 171, 60 A. 2d 743 (1948). It was repeated in a restricted form in *Cassel v. Baltimore*, 195 Md. 348, 358, 73 A. 2d 486, 488 (1950). This *dictum* was then expanded by additional *dicta* in *Kracke v. Weinberg*, 197 Md. 339, 79 A. 2d 387, 391 (1951) which added 'mistake in original zoning' to a 'change in the character of the neighborhood' — and so the Maryland Rule of 'mistake-change in conditions' was born. It was entirely judicially conceived and delivered. It had no legislative assistance. It has had a rapid and, to my mind, unhealthy growth in the Maryland law. The formulae have become talismanic phrases now applied with Draconian severity to the rezoning efforts of the local legislative bodies, with unfortunate results. In my opinion, the time to re-examine the entire doctrine and its premises is long overdue. As it is entirely 'judge-made,' a change in, or broadening of, the doctrine would operate only prospectively and would in no way impair vested rights, inasmuch as it is not a

rule of property. Under these circumstances, the doctrine of *stare decisis* is not a substantial obstacle in effecting a much-needed change. If my Brethren are reluctant to overrule or modify the 'mistake-change' doctrine, I suggest with great respect, that the Legislative Council and ultimately the General Assembly give serious thought to a change by appropriate legislation" (Citations omitted).

It is submitted that the application of the "change or mistake rule" to zoning matters denies to Petitioners due process and equal protection of the laws. The Petitioners submit that it is unconstitutional to allow the Court of Appeals of Maryland to test the decisions of administrative agencies in that state by a determination of whether their actions are "arbitrary, unreasonable and capricious" except in the area of zoning agency decisions which the Court of Appeals desires to test by asking whether there has been a "change in the conditions or a mistake in the original plan." Such conduct clearly singles out the Petitioners and applies to them a different and more difficult standard.

CONCLUSION

Wherefore, it is respectfully urged that a Writ of Certiorari be granted directing the Court of Appeals of Maryland to submit its record in this matter for review by this Court of its rulings or failure to rule on the important federal questions raised therein.

Respectfully submitted,

RICHARD D. PAYNE,

For Petitioners.

APPENDIX A

Opinion of Zoning Commissioner

Pursuant to the advertisement, posting of property and public hearing on the above petition and it appearing that the petitioners did not prove an error in zoning the subject property on the Western Area Map, the above reclassification should Not Be Had, and therefore it follows that the Special Exception should Not Be Granted.

It Is Ordered by the Zoning Commissioner of Baltimore County, this 1st day of December, 1964, that the above reclassification be and the same is hereby Denied and that the above described property or area be and the same is hereby continued as and to remain a R-40 zone; or the Special Exception for Junk Yard be and the same is hereby Denied.

John G. Rose,

Zoning Commissioner of
Baltimore County.

True Copy Test:

John G. Rose

Zoning Commissioner of
Baltimore County

Opinion of Board of Zoning Appeals of Baltimore County

The petitioners in this case seek a reclassification from an R-40 zone to a Manufacturing Heavy (M-H) zone of a tract of ground of approximately 30.5 acres north of the Patapsco State Park and west of the Wrights Mill Road in the Second Election District of Baltimore County. The petitioners also request a special exception for a Junk Yard on a five acre parcel in the center of the thirty acre tract mentioned above. The special exception sought is in accordance with Section 408 of the Zoning Regulations, and in order to comply with the setback requirements

set forth in Section 408.2 the property owners are required to seek a rezoning of the entire thirty acre tract to achieve their basic request for the special exception for a Junk Yard.

The zoning map in question was adopted by the Baltimore County Council in November of 1962. The zoning on the east, north, and west sides of the subject property is R-40 as is the great majority of all the land on the zoning map for this area. The south boundary of the property borders on property owned by the State of Maryland which is part of the Patapsco State Park. The State of Maryland acquired seven acres of property from the petitioners in 1958 for the park and at that time apparently was well aware of the commercial use on the remaining Shifflett property.

The petitioners produced numerous witnesses who have been familiar with the property dating back to the late 1930's and they testified, without contradiction, that the property has been used continuously as an automobile junk yard since, at least, prior to the enactment of the zoning regulations for Baltimore County in 1945. The Board finds as a fact that the property has been used as an automobile junk yard since prior to 1945 and if it were not for Section 200.16 of the Zoning Regulations it would presently enjoy a legal non-conforming use as a junk yard. Section 200.16 of the Zoning Regulations, which was enacted by the County Council on November 17, 1962, provides that any existing junk yard in a residential zone shall be eliminated within two years of the date of its enactment. The Board understands from counsel that the constitutionality of this amendment is presently being attacked in the Circuit Court for Baltimore County but has not yet been decided.

Cecil Shifflett, one of the petitioners in this case, testified at length as to the operation of the business conducted on the property. He testified that the value of the inventory in 1965 was approximately $225,000 and that for the same year he had a payroll of approximately $60,000. He further stated that he has spent $20,000 since 1956 on new equip-

ment, tools, and an office building, and that as recently as 1963 he spent $12,000 for regrading the property, paving the access road, and installing a drainage system. He further stated that in 1962 he was not aware of the proposed land use map that was under consideration by Baltimore County and subsequently adopted by the County Council in November of 1962; also he was not aware of County Council Bill No. 140 (subsequently enacted as Section 200.16 of the Zoning Regulations until April of 1964 when he received a letter from the Baltimore County zoning authorities telling him that he was obliged to close out his business by November 17, 1964.

George Gavrelis, Director of Planning for Baltimore County, was called to testify by the protestants in this case. He testified that the Planning Staff is opposed to the reclassification because of the primarily rural atmosphere of this area, however, he also stated that the Staff was not aware of the existence of the junk yard on the subject property when it studied the area in connection with the preparation of the land use map. He agreed the County presently has a substantial problem in disposing of junk automobiles but that in 1962 the Staff did not have any needs study for automobile junk yards and that the pressure for the enactment of Section 200.16 of the Zoning Regulations banning existing junk yards in residential zones came after the Planning Board's adoption of the land use map here.

The majority of the protestants, who were residents of the neighborhood, did not seem to be opposed to the present operation conducted on the property by Shifflett, but are fearful that the reclassification of a thirty acre tract from R-40 to M-H would:

1. be an unwarranted intrusion of manufacturing zoning into a rural area, and,
2. could possibly lead to other requests for manufacturing zoning.

It may be well here for the Board to briefly cite the testimony of each of the protestants that appeared at the hearing.

Iris Sassi: Mrs. Sassi testified that she fears the rezoning of the subject tract would lead to the rezoning of the Makowski property which adjoins Shifflett. She further testified that she did not personally oppose the Shiffletts, and that the business operated by Shifflett has not adversely affected her.

Clarence W. Martin, M.D.: Dr. Martin objected to the reclassification and specifically to the junk yard. He testified that he has seen cars hauled to and from the property, and that odd and bizarre signs had been placed at the entrance road advertising the business conducted on the premises. He also cited the narrowness of Wrights Mill Road but did state that he could not see the property from his residence.

Edward Minor: Mr. Minor, a member of the Planning Board of Baltimore County, objected to the use of the property and cited the narrowness of the roads in the vicinity. He also indicated that he cannot see the cars from his property but that at certain times he can see the reflection of the sunlight on the metal bodies. He further stated that the junk yard cannot be seen from the Patapsco State Park property.

William A. Parr: Mr. Parr the Superintendent of the State Parks system appeared opposing the petition on behalf of the State stating that he feels that the Manufacturing Heavy use potentials conflict with the State Park usage of its property to the south. His testimony indicated that no development of the State property is contemplated at this time, and that the development of the property as a park here would possibly be ten years away. He also indicated that he objected to both phases of the petition but objected more strenuously to the thirty acre M-H zone.

Myrtle E. Sauter: This witness resides on Dogwood Road approximately a mile east of the property and while she apparently cannot see the subject property she generally objects to the petition.

Harriett Saylor: Mrs. Saylor lives on Dogwood Road approximately a mile and a quarter from the property and

stated that on occasion she could see smoke rising from the operation.

Mrs. Conway Robinson: Mrs. Robinson lives on a farm west of the subject property and is generally opposed to the petition although she did state that the present operation on the property did not bother her.

Mrs. Quail: Mrs. Quail is the owner of the thirty acre tract on Wrights Mill Road across from Dr. Martin, one of the other witnesses, and is approximately one-half mile from the subject property. She objected primarily on the grounds that he wanted the area to remain strictly residential.

There was no testimony of any substantial change in the character of the neighborhood since the adoption of the map in 1962, however, the Board feels that the zoning on the subject property is erroneous in that the Planning Staff, prior to the adoption of the map, was apparently unaware of the existing commercial use on the property, and consequently did not even consider recommending zoning on the property that would allow the commercial use of the land to continue, even though apparently (from Cecil Shifflett's testimony) in 1962 the petitioner had an inventory of cars valued at $97,000 located on the property. It seems to the Board that to properly adopt a land use map the County should endeavor to determine existing land uses of properties, and in cases where feasible, adopt zoning that would allow existing businesses to continue their operation as long as they are not detrimental to the general health, safety, and welfare of the public. The testimony in this case indicated that very few, if any, persons can actually see the junk operation on the tract, and, as cited above, several witnesses testified that they knew of the use of the property but that it had not adversely affected them. Indeed, the overlooking of the existing use of this property by the Planning Staff would indicate that the junk operation is so remote and screened from public view that very few people are even aware of its existence.

The Board feels, for reasons cited above, that there is an error with regard to the zoning of the subject tract with regard to the five acre parcel on which the special exception is requested, and not with regard to the remaining twenty-five acres on which the petitioner requests M-H zoning. If the petitioner is to continue his present operation on the five acre parcel, which we feel should be properly M-H, it will be necessary for him to obtain setback variances from the adjoining R-40 zone, as Section 408.2 of the Zoning Regulations requires a setback of at least 300 feet from any other zone. If the petitioner has to comply strictly with this regulation (408.2) then the five acre parcel would be totally unusable to him as a junk yard. We feel that strict compliance with the aforementioned Section would result in a practical difficulty or an unreasonable hardship to the petitioner in that he would be completely deprived of the use of his property. Further, we do not feel that any such variance would violate the spirit and intent of the Zoning Regulations as the setback variance that would be required is a setback only from a zoning line, and the surrounding property is all owned by the petitioner, therefore, such a setback variance could harm no one except the petitioner himself.

The Board feels that the petition for the reclassification from an R-40 zone to an M-H zone for the entire 30.5 acres should be denied, but that the five (5) acre parcel of ground on which is requested both a reclassification and special exception should be granted. The testimony does not indicate that the special exception sought would in any way violate Section 502.1 of the Zoning Regulations, therefore, the special exception requested will be granted. We will also grant the petitioner a variance from Section 408.2 of the Zoning Regulations allowing a zero foot setback instead of the required 300 foot setback from the surrounding R-40 zone.

ORDER

For the reasons set forth in the aforegoing Opinion, it is this 25th day of May, 1966 by the County Board of Appeals, ORDERED that the reclassification from an R-40

zone to an M-H zone in accordance with the attached legal description, be and the same is hereby granted, and that the petitioner is granted a variance from Section 408.2 of the Zoning Regulations allowing a zero foot setback instead of the required 300 foot setback from the surrounding residential zone for the storage of automobiles not in running condition and, further, that the special exception requested be and the same is hereby granted subject to the following restrictions:

1. That a stockade type fence shall completely surround the property and dense evergreen screening, at least six (6) feet in height and at least five (5) feet in width, shall be planted outside the aforesaid fence
2. That burning of automobiles shall take place on the property no more than once each month, and then only on week days and days on which the wind velocity shall be at least ten miles an hour or more to rapidly dissipate only smoke emitting from such burning
3. That no public address system shall be used on the property in conjunction with the operation conducted thereon
4. That there shall only be one sign at the entrance of the property advertising the business conducted thereon, and such sign shall be unlighted, constructed of wood, and not larger than twenty (20) square feet.

Any appeal from this decision must be in accordance with Chapter 1100, subtitle B of Maryland Rules of Procedure, 1961 edition.

COUNTY BOARD OF APPEALS OF
BALTIMORE COUNTY,

WILLIAM S. BALDWIN, Chairman,

JOHN A. SLOWIK,

PAUL T. MCHENRY, JR.

Memorandum Opinion and Order of Trial Court

This case involves an appeal from the County Board of Appeals of Baltimore County, which by its Order dated May 25, 1966, granted a reclassification of five (5) acres of a 30.5 acre tract requested in their petition, from an R-40 (Residence — 1 Family) zone, to an M-H zone (Manufacturing — Heavy), with a Special Exception for a Junk Yard. Further, the Board granted a variance from Section 408.2 of the zoning regulations, allowing a zero foot set-back instead of the required 300 foot set-back from the surrounding R-40 zone. Further, the Board imposed restrictions with respect to the use of the Junk Yard as follows:

1. That a stockade type fence shall completely surround the property and dense evergreen screening, at least six (6) feet in height and at least five (5) feet in width, shall be planted outside the aforesaid fence.
2. That burning of automobiles shall take place on the property no more than once each month, and then only on week days and days on which the wind velocity shall be at least ten miles an hour or more to rapidly dissipate any smoke emitting from such burning.
3. That no public address system shall be used on the property in conjunction with the operation conducted thereon.
4. That there shall only be one sign at the entrance of the property advertising the business conducted thereon, and such sign shall be unlighted, constructed of wood, and not larger than (20) square feet.

The protestant plaintiffs are property owners in an R-40 zone (Residence — 1 Family), whose properties are anywhere from ¼ of a mile to 1 mile or more from the applicant's property, and have recently seen a five acre tract nearby rezoned to M-H (Manufacturing-Heavy), a Special Exception for a Junk Yard, and a zero set-back

variance, rather than the required 300 foot set-back, granted by an Order of the County Board of Appeals of Baltimore County. The protestants are appealing the decision of the Board of Appeals, not especially because they are distraught at the presence of the Junk Yard but because they fear that the potential of M-H zoning in their neighborhood opens the door to several other possible manufacturing operations which could be far more repugnant than a Junk Yard. M-H zoning in Baltimore County opens the door for practically any type of operation of an industrial nature. Actually, the majority of the protestants testified that they had no objection to the Junk Yard itself, which is well camouflaged by trees and the hilly topography of the land, and which Junk Yard has existed since the late 1930's. Thus the Junk Yard was in existence prior to 1945 when the zoning regulations were adopted by Baltimore County originally, and which regulations permit a nonconforming use of any properties in the County to continue after the adoption of these regulations, with some exceptions.

It is well established that the function of the Circuit Court is not to zone, and that the said Court will disturb the order of the Board of Appeals only where the question is not fairly debatable, or where there is evidence in the record of unreasonableness, arbitrariness, or capriciousness. *Finney v. Halle*, 241 Md. 236; *Mothershead v. Board of County Commissioners*, 240 Md. 365; *City of Baltimore v. Borinsky*, 239 Md. 611; *Beth Tfiloh v. Blum*, 242 Md. 84, etc.

We find that the question was fairly debatable and that there is no evidence that the action of the Board was unreasonable, arbitrary, or capricious.

The zoning officials will rezone if there is evidence of substantial change in the character of the neighborhood since the inception of the existing zoning ordinances, or if there is evidence of original error in the drawing of the comprehensive zoning map. *Bosley v. Hospital*, 246 Md. 197; *Queen Anne's County v. Miles*, 246 Md. 355, etc.

The evidence of original error in the instant matter seems crystal clear. The Junk Yard business was in exist-

ence long before the zoning map was adopted in 1962. Mr. George Gavrelis, Director of Planning for Baltimore County, admitted under oath, that his staff was not aware of the existence of the Junk Yard when they prepared the zoning map. Further, the owner, Cecil Shifflett, has a substantial investment in his business approaching $300,000. We might add that the admission of Mr. Gavrelis seems an attestation to a fine effort on the owner's part to minimize the unavoidable eyesore of a Junk Yard by shielding the metal components with trees and hills. It is an effort that deems emulation by other Junk Yard owners.

The Petitioner owns 30.5 acres. By granting only a five (5) acre reclassification, the Board found a very equitable remedy. The remainder of the tract remains R-40, providing a buffer against the rest of the neighborhood and making it possible for the owner to operate his junkyard in the entire five acres without adhering to set-back ordinances. It would be both an unnecessary hardship and futile not to grant the set-back variance as the surrounding property remains his own and a 300 foot set-back would eliminate the Junk Yard.

The Court admits that the threat remains that the five acres could become an immensely more noxious enterprise if Shifflett should sell the five acres. We find this unfortunate but place the blame for this possible inequity on the legislative agency which wrote the inflexible area of the zoning. Again it is not the function of the Court to write zoning laws, or substitute their judgment for that of the agency. In *Mothershead v. Bd. of Comm'rs,* 240 Md. 365 (decided November 18, 1965), the Court, in quoting from Judge Hammond's opinion in *Board v. Oak Hill Farms,* 232 Md. 274 p. 283 stated at pages 371-372 as follows:

> "* * * the courts have exercised restraint so as not to substitute their judgments for that of the agency and not to choose between equally permissible inferences or make independent determinations of fact, because to do so would be exercising a non-judicial role. Rather, they have attempted to decide whether a reasoning mind could reasonably have reached the result

the agency reached upon a fair consideration of the fact picture painted by the entire record.

"In the cases dealing with consideration of the weight of the evidence, the matter seems to have come down to whether, all that was before the agency considered, its action was clearly erroneous, or to use the phrase which has become standard in Maryland zoning cases, not fairly debatable."

See cases cited supra.

The testimony before the County Board of Appeals further developed that County Council Bill No. 140 subsequently enacted as Section 200.16 of the zoning regulations phased out junk yards in Baltimore County as of November 17, 1964. The record clearly shows that the Petitioner, Cecil Shifflett, was not aware of this phasing out until April, 1964. As a result, the validity of this ordinance was contested before the Circuit Court for Baltimore County, and Judge John E. Raine, Jr. found that the ordinance was a valid exercise of police power. On appeal to the Court of Appeals of Maryland, the matter of Cecil Shifflett v. Baltimore County, Maryland, et al. decree of Judge Raine was affirmed. The Court would like to comment on this matter of *Shifflett v. Baltimore County*, 247 Md. 151, decided on June 8, 1967, whereby the elimination of non-conforming uses was deemed to be constitutional and reasonable. As a result; Cecil Shifflett would be out of business unless the reclassification and special exception were awarded to him. We feel that the harm to the applicants outweighs a very nebulous benefit to the public by disallowing this business of substantial investment and longevity.

In the Appellants' memorandum, it set forth, "to sustain a piecemeal change, there must be strong evidence of mistake in the original zoning or in the comprehensive rezoning, or else a substantial change in conditions." Appellants cite *The Shadynook Improvement Association v. Molloy*, 232 Md. 265; *Pahl v. County Board of Appeals*, 237 Md. 294; *Becker Company v. Jerns*, 230 Md. 541; *Dill v. Jobar Corp.*, 242 Md. 16. We heartily agree with this summation of the law which disfavors spot zoning. Law of

its very nature must be flexible and find exceptions. This instant case is such an exception for truly we cannot see how there could be stronger evidence of mistake in the original zoning.

The County Board of Appeals also imposed stringent restrictions on the use of the five acres by screening limitations as to burning, eliminating any public address system, and the limitation of the use of signs affecting the business. These limitations will be additional protection and safeguards to the protesting property owners.

For the reasons stated above, it is this 14th day of November, 1967, by the Circuit Court for Baltimore County, ORDERED that the order of the County Board of Appeals of Baltimore County dated May 25, 1966, be and the same is hereby affirmed.

JOHN N. MAGUIRE,
Judge.

OPINION OF COURT OF APPEALS OF MARYLAND

In The
Court of Appeals of Maryland
September Term, 1968
No. 7

Edward Minor, et al. and Conway Robinson, et al.

v.

Cecil E. Shifflett, et al.

Before Hammond, C.J., Marbury, Barnes, McWilliams, Singley, and Smith, JJ.

Concurring Opinion by Barnes, J.

Filed: January 15, 1969

Smith, J.:

Appellees (Shifflett) have operated an automobile junk yard at their present location in the extreme western sec-

tion of Baltimore County since about 1932. The zone in which they are located is an R-40 zone. Their use has been a nonconforming use since the adoption of zoning in Baltimore County in 1945.

Shifflett is no stranger to this Court. See *Shifflett v. Baltimore County*, 247 Md. 151, 230 A. 2d 310 (1967) wherein we upheld the validity of the Baltimore County ordinance adopted in 1962 requiring the elimination of junk yards in all residential zones of the county within two years.

Shifflett applied to the Zoning Commissioner of Baltimore County for a reclassification of his property to an MH zone and for the granting of a special exception pursuant to the Zoning Law and Zoning Regulations of Baltimore County permitting a junk yard. The reasons assigned were error in original zoning and change in the neighborhood. The request was denied.

Appeal was entered to the County Board of Appeals of Baltimore County. That Board denied reclassification of the entire 30.5 acre tract but did grant reclassification of the five acre parcel of ground on which the junk yard was located. It, likewise granted the special exception.

Appellants appealed to the Circuit Court for Baltimore County which court affirmed the decision of the Board of Appeals. This appeal followed. For the reasons hereinafter set forth we hold the reclassification should have been denied.

Junk yards are not permitted in any zone in Baltimore County except in an MH zone and then only by special exception.

The area in question lies just north of Patapsco State Park. It is located "as the crow flies" almost a mile from an MLR zone. With that exception, the land for quite some distance around the subject property is classified for residential use.

The zoning map in question was adopted on November 15, 1962. The area was zoned as residential, however, from the adoption of zoning in Baltimore County in 1945.

The MH classification (manufacturing heavy) is the most liberal of the zones in Baltimore County as to the uses permitted therein.

Shifflett presented testimony of five witnesses other than himself. Their testimony was devoted almost entirely to the long standing use of the property for junk yard purposes. It is conceded that the junk yard operation is carried on on the five acre portion for which the special exception was requested.

The Shifflett witnesses mentioned the one time existence of a quarry on subject property. The only portion of their testimony concerned with surrounding property was that of the witness Duvall who said there were about 20 houses in about a three mile section of Wright's Mill Road from Dogwood Road around the loop back to Old Court Road.

Access to subject property is by Wright's Mill Road, the paved portion of which was said to be nine feet in width at the subject property.

Although Mr. Gavrelis, Director of Planning for Baltimore County, connected with the County Planning Department since 1951, testified on cross examination (having been called as a witness by the protestants) that at the time of the adoption of the zoning map by the Planning Board he personally had no knowledge of the industrial use of Shifflett, and Shifflett regarded this in this Court as evidence of error in original zoning, no other evidence was presented as to the knowledge or lack of knowledge of the Baltimore County Zoning authorities as to the use of the land for junk yard purposes. The Board of Appeals found as a fact that the property had been used as an automobile junk yard since prior to 1945 and that if it were not for Section 200.16 of the Zoning Regulations it would presently enjoy a legal nonconforming use as a junk yard. In finding error in the original zoning the Board said:

> *"There was no testimony of any substantial change in the character of the neighborhood since the adoption of the map in 1962,* however, the Board feels that the zoning on the subject property is erroneous in that

the Planning Staff, prior to the adoption of the map, was apparently unaware of the existing commercial use on the property, and consequently did not even consider recommending zoning on the property that would allow the commercial use of the land to continue, even though apparently (from Cecil Shifflett's testimony) in 1962 the petitioner had an inventory of cars valued at $97,000 located on the property. It seems to the Board that to properly adopt a land use map the County should endeavor to determine existing land uses of properties, and in cases where feasible, adopt zoning that would allow existing businesses to continue their operation as long as they are not detrimental to the general health, safety, and welfare of the public. The testimony in this case indicated that very few, if any, persons can actually see the junk operation on the tract, and, as cited above, several witnesses testified that they knew of the use of the property but that it had not adversely affected them. Indeed, the overlooking of the existing use of this property by the Planning Staff would indicate that the junk operation is so remote and screened from public view that very few people are even aware of its existence." (Emphasis added.)

In sustaining the action of the Board of Appeals the Circuit Court said in part:

> "The evidence of original error in the instant matter seems crystal clear. The Junk Yard business was in existence long before the zoning map was adopted in 1962. Mr. George Gavrelis, Director of Planning for Baltimore County, admitted under oath, that his staff was not aware of the existence of the Junk Yard when they prepared the zoning map. Further, the owner, Cecil Shifflett, has a substantial investment in his business approaching $300,000."

A careful reading of the record does not disclose any statement on the part of Mr. Gavrelis wherein he said that his staff was not aware of the existence of the junk yard

when they prepared the zoning map. Interestingly enough, no such statement is cited in Shifflett's brief. It is true, as Shifflett's brief stated, that in response to a question of Mr. Baldwin of the Board of Appeals Mr. Gavrelis stated that the Planning Board in making its recommendation normally considers the existing uses of the property. The next series of questions and answers went, however, as follows:

> "Q. And usually you try to recognize, say if I have a nonconforming gas station, or a grocery store, or something along the road, you usually try to recognize the existing commercial or industrial uses, don't you? A. In all fairness, I would have to say not always.
>
> "Q. I don't mean in every case. A. They are identified, and from a planning viewpoint, and if it seems they do make sense as part of the zoning fabric, commercial zoning or what is recommended to the Board, but on the other hand, if the property has no zoning status, if it is a nonconforming use, and from a staff viewpoint, and from the Board viewpoint, it is felt that the establishment of zoning potentials is incompatible, the recommendation is made it retain its nonconforming status."

Mr. Gavrelis also testified as follows in response to a series of questions about the lack of an MH zone on the Western Area Map:

> "Q. Wouldn't you, normally, in adopting a map, somewhat try to balance the land use? A. No, not at all. Again, if you examine the zoning regulations, I think you will find that the M-L-R, and the M-L zones, are rather permissive, and the distinction between essentially M-L and M-H is that the M-H starts to introduce the more, I will call it heavy type of industries, like steel mills, or refineries, or refractories, the ones that potentially have more nuisance and/or developed in very large complexes, and basically, I think that is the feeling of the planning staff, and I am sure the Planning Board, this kind of zoning, which

perhaps has an inherent requirement for access to either rail or port, rather than simply the expressway system, just didn't seem to be appropriate in this portion of the county.

"I do recall we had some M-H zoning in the 13th District, where we had some concentration of rail access.

"Q. Certainly a 5-acre junk yard doesn't require access to rail or port, does it? A. Well, we are talking about M-H zoning broadly, and I answered the question in that vein.

"Q. (By Mr. MacDaniel) Why do you require a junk yard to be in an M-H zone there? You are in favor of a junk yard in an M-H zone, aren't you? A. With the right circumstances, yes.

"Q. But if a junk yard exists in an M-H zone, do you feel that all the other requirements in an M-H zone must be there in order for there to be a junk yard existing in that area? A. Generally, yes.

"Q. Why, — if they are not needed for the junk yard? A. You can go around and around and around."

Moreover, on the quarry aspect Gavrelis testified a quarry can exist with a special exception in R-10, R-20, and R-40 residential zones and in business and manufacturing zones where no blasting was required.

The only expert testimony before the Board of Appeals was that of Mr. Gavrelis who testified:

"The Board has neither reviewed or acted on this petition. With respect to the planning staff itself, we feel that the original recommendation for R-40 zoning was, in fact, correct, that again there is nothing inherent in the location, the topograph, the environment of this particular property, which indicates to us that industrial zoning would be at all appropriate, pointing out that M-H zoning is the most permissive, the most liberal zone which we have on our books, allows the broadest gamut of potential uses, and from a planning staff viewpoint we do not at all feel that is an

appropriate place for the establishment of these broad zoning potentials, to start with, having from a staff position rejected the concept of industrial zoning here, to start with, the business of dealing with junk yard becomes somewhat moot.

"From a staff position, however, we do not at all feel that junk yards are a felicitous or happy or compatible land use generally. They offer, very obviously, some very unique problems, and offer some very difficult relationships to adjoining properties, recognizing that junk yards in themselves are a problem, we do believe there are locations in Baltimore County which have the appropriate zoning, which could be utilized, and properly so, for this kind of use.

* * *

"We do not recommend the establishment of a junk yard here."

The burden of proof in a zoning case is on the individual seeking zoning reclassification. In *Pahl v. County Board of Appeals*, 237 Md. 294, 206 A. 2d 245 (1965) we said:

"Under the well established rule in Maryland, '* * * there is a strong presumption of the correctness of original zoning and of comprehensive rezoning, and * * * to sustain a piecemeal change therefrom, there must be strong evidence of mistake in the original zoning or in the comprehensive rezoning or else of a substantial change in conditions.' *Shadynook Imp. Assn. v. Molloy*, 232 Md. 265, 269-70, 192 A. 2d 502. See also *Greenblatt v. Toney Schloss*, 235 Md. 9, 200 A. 2d 70." *Id.* at 297.

In *Reese v. Mandel*, 224 Md. 121, 167 A. 2d 111 (1961) we said:

"In testing the action of the Board of Appeals herein, we start off with a strong presumption of the validity of the classifications made when the comprehensive map was adopted, and those who attack the classifications bear a heavy burden of overcoming the

presumption of their validity-heavier in the case of comprehensive zoning than in the case of piecemeal reclassification." *Id.* at 128.

We further said there:

> "Where the validity of the action taken by the Board is reasonably and fairly debatable, as we have stated was the case here, the courts have no authority to overturn that action by substituting their judgment for that of the Board." *Id.* at 129.

Stated in another way:

> " '[T]he Courts may not substitute their judgment for that of the Board when the Board's decision is supported by substantial evidence and the issue before the Board was fairly debatable.' *Bosley v. Hospital for Consumptives*, 246 Md. 197, 204, 227 A. 2d 746 (1967) citing *Vogel v. McCosh*, 242 Md. 371, 219 A. 2d 89 (1966). See also *Agneslane, Inc. v. Lucas*, 247 Md. 612, 233 A. 2d 757 (1967)." *France v. Shapiro*, 248 Md. 335, 342, 236 A. 2d 726 (1968).

See also, *Goucher College v. DeWolfe*, ... Md. ....., ... A. 2d [No. 406, September Term, 1967 decided December 6, 1968] citing *Agneslane, supra.*

Judge Singley, in stating the law applicable to reclassification continued:

> "However, the '[C]ourt will, where the record is so devoid of substantial supporting facts as to be incapable of raising a debatable issue, declare the legislative or administrative action invalid.' *Baker v. Montgomery County Council*, 241 Md. 178, 186, 215 A. 2d 831 (1966) citing *Jobar Corp. v. Rodgers Forge*, 236 Md. 106, 202 A. 2d 612 (1965); *Levitt and Sons v. Board of County Commissioners*, 233 Md. 186, 195 A. 2d 723 (1963)." *France, supra*, at 342.

In *Hewitt v. Co. Comm'rs*, 220 Md. 48, 58, 151 A. 2d 144 (1959) Chief Judge Brune quoted, with approval, *Huff v.*

Board of Zoning Appeals, 214 Md. 48, 57, 133 A. 2d 83 (1957) wherein our present Chief Judge stated:

> " 'When a zoning ordinance or an amendment puts a small area in a zone different from that of the surrounding area, we have what may be called "spot zoning", using the term in a descriptive sense. Such zoning may be invalid or valid. *If it is an arbitrary and unreasonable devotion of the small area to a use inconsistent with the uses to which the rest of the district is restricted and made for the sole benefit of the private interests of the owner, it is invalid. Cassel v. City of Baltimore*, 195 Md. 348, 355. On the other hand, if the zoning of the small parcel is in accord and in harmony with the comprehensive zoning plan and is done for the public good — that is, to serve one or more of the purposes of the enabling statute, and so bears a substantial relationship to the public health, safety, morals and general welfare, it is valid. *Offutt v. Board of Zoning Appeals*, 204 Md. 551, 561; *Temmink v. Board of Zoning Appeals*, 205 Md. 489, 495; *Ellicott v. City of Baltimore*, 180 Md. 176, 183; *Cassel v. City of Baltimore, supra.*' " (Emphasis added.)

There are certain exceptions to "spot zoning" recognized in the *Cassel* and *Temmink* cases, "such as the creation of small districts within a residential zone for the operation of such establishments as grocery stores, drug stores, barber shops, and even gasoline stations, for the accommodation and convenience of the residents of the residential zone. Cf. *Ellicott v. City of Baltimore*, 180 Md. 176, 23 A. 2d 649." *Hewitt, supra*, at 60.

The opinion in the Circuit Court for Baltimore County states in part:

> "* * * We feel that the harm to the applicants outweighs a very nebulous benefit to the public by disallowing this business of substantial investment and longevity."

This position is in direct conflict with Chief Judge Hammond's comment in *Huff* which appeared in *Hewitt, supra.*

If we were to assume, *arguendo,* that the Baltimore County Planning Department was unaware of the use made of the subject property, it would nevertheless be noteworthy that there was no expert testimony before the Board of Appeals as to the reasonable probability of a different zoning classification had the zoning authorities been aware of such use. It also is noteworthy that the only expert who testified before the Board stated with reference to an MH zone that he regarded an inherent requirement to be access to rail or port facilities. There was no showing of such access.

The presence of a nonconforming use in an area would not and could not be evidence of error in original zoning requiring a change of classification. To so hold would defeat the very purposes of zoning. Ordinarily, planners expect that nonconforming uses will wither on the vine, so to speak, and ultimately disappear. The usual zoning ordinance provides, as does the Baltimore County ordinance, that a discontinuance of a nonconforming use for a specified period of time shall be deemed an abandonment.

No evidence was presented that the use contemplated for the subject property was the only use for which it was fitted. In fact, the modern home of Shifflett was located thereon. Although there was an allegation that the topography of the land was "rough and rugged", there was no showing that the 30.5 acres of land of Shifflett differed in its terrain from the many acres of residential land surrounding it.

The burden of proof was on Shifflett. The Board of Appeals conceded that there was no evidence of any substantial change in the character of the neighborhood. The uncontradicted evidence is that the entire surrounding area is devoted to residential uses. We hold the record to be devoid of substantial supporting facts as to original error. The request here is squarely within the language of *Huff* and *Hewitt, supra.* The request was for the sole

benefit of the private interests of the owner and is for a use inconsistent with the uses to which the rest of the district is restricted.

ORDER REVERSED, COSTS TO BE PAID BY THE APPELLEES.

BARNES, J., concurring:

I most reluctantly concur in the result in this case. I only concur because I *must* as a result of the doctrine of *stare decisis*.

The result in the case on this appeal — contrary to the result reached both by the Board and by the Circuit Court — is based upon two lines of decision in this Court both of which I consider to be quite erroneous and contrary to a correct understanding of the constitutional provisions involved.

The first of these erroneous lines of decision is the Maryland "change in conditions — mistake in original zoning" rule. My comments upon this unfortunate rule in regard to its curious inception, its illogical character and its unhappy results, have already appeared at some length in earlier dissenting and concurring opinions. See *MacDonald v. Board of County Comm'rs*, 238 Md. 549, 557, 604, 210 A. 2d 325, 329, 340 (1965). See also *Wahler v. Montgomery County Council*, 249 Md. 62, 71, 238 A. 2d 266, 271 (1968) and *Randolph Hills, Inc. v. Whitley*, 249 Md. 78, 90, 238 A. 2d 257, 264 (1968).

These comments need not be repeated again or even summarized here. The present case, however, appears to me to be a good example of an unfortunate and unsound result, emanating from this erroneous doctrine, which is gravely injurious to the property rights of Shifflett, the property owner, and to the public interest as well.

First of all, it is established that the junk use is a lawful use of private property, and does not create a nuisance *per se*. *Town of Bladensburg v. Berg*, 216 Md. 292, 296, 139 A. 2d 703, 705-06 (1958).

Secondly, the private property involved in this case has been used for the lawful purpose since 1932, assuming, arguendo, that Section 200.16 of the Baltimore County Zoning Regulations is unconstitutional. The property owner has a substantial investment of approximately $300,000 in this property and the business conducted there. The use of this property for a lawful business is, in my opinion, a *vested* property right. The lawful use provides substantial employment for 10 full-time employees, and two part-time employees, with a payroll of approximately $60,000 per year. The use not only is beneficial to the economy generally but specifically provides employment and advances the public interest in that important way.

Thirdly, the vesting of this property right occurred some 13 years before the original zoning in the area in 1945 and has continued without interruption until the present time.

What other property owner has been injured by this use? Some of the protestants in this case did not even know of the existence of the use when they acquired and moved into their properties. While others knew about the use, some could not see the subject property from their own properties; and not one testified in regard to any specific injury to him personally or even to any specific amount of depreciation in the value of his property resulting from Shifflett's use. The terrain where the junk use is carried on is quite rough and at one time there was a quarry on the property. No nearby or other property owner has sought any relief in equity for any alleged nuisance, doubtless because there is no nuisance. And yet, notwithstanding this factual situation, his long-established lawful and beneficial use, by the terms of Section 200.16 of the Baltimore County Zoning Regulations, enacted by the County Council on November 17, 1962, must be obliterated, with no provision for just compensation, unless the Board could pursuant to its delegated legislative powers rezone a sufficient part of the subject property to enable the property owner to continue the use. At this point the difference between what I conceive to be the proper constitutional doctrine which ought to be applied and the Maryland "change-mistake" rule becomes clearly apparent.

It is conceded that there has been no "change in conditions" since the last comprehensive rezoning to justify the Board in approving the rezoning. I must agree with the majority in its observation that the *proof* in the present case does not support the Board's finding that there was a "mistake in original zoning." There was no expert testimony to this effect introduced on behalf of Shifflett. Indeed, the *only* expert testimony in the case — that of Mr. Gavrelis — indicated (hypothetically, at least) that there was, in his opinion, no error in the original zoning. It is apparent, I think, that merely because there was a nonconforming use created at the time of the original zoning, which was not then made to conform by some type of zoning, there is not, *ipso facto*, a "mistake" in the original zoning.

If, however, the proper constitutional doctrine were applied, which, in my opinion, is whether or not the rezoning action of the Board was "arbitrary, unreasonable or capricious" and thus a denial of due process of law contrary to Article 23 of the Declaration of Rights in the Maryland Constitution — the usual test in other challenges to the exercise of legislative power (unless limited by the provisions of the delegation of the exercise of this power to an agency other than the legislative body itself) — it is clear to me that the Board's action in this case was not at all "arbitrary, unreasonable or capricious" but, on the contrary, was a reasonable decision, based on the preservation of vested property rights and calculated to advance the public interest. In short, as I have indicated in the other opinions mentioned, the Maryland "change-mistake" rule confines the exercise of the legislative power in rezoning cases to a consideration of two factors only, and thus creates a new *constitutional limitation*. As I see it, there are a number of other equally important factors which the legislative body exercising the rezoning power could well take into consideration in reaching a reasonable decision, even though there may not be in the particular case a "change in conditions" or "mistake in original zoning." Indeed, the tempering of the effect of a harsh and inequitable application of a general provision of the zoning law to

a particular factual situation is one of the essential functions of the Board in exercising its rezoning functions, so long as the exercise of that necessary power does not result in arbitrary, unreasonable, discriminatory or capricious action. In my opinion, reasonable men could conclude that both justice to the property owner and the public interest required the granting of the rezoning in this case and it cannot properly be said that the Board's action offended the constitutional limitation of due process of law by being arbitrary, unreasonable or capricious or discriminatory. When this situation exists, we have no constitutional power to disturb the legislative action, unless there is some violation of another constitutional protection enjoyed by the property owner, e.g., when there is an attempt to take private property for public use without the payment of just compensation contrary to Article III, Section 40 of the Maryland Constitution.

This brings me to the second line of erroneous decision, which began with *Grant v. Mayor and City Council of Baltimore*, 212 Md. 301, 129 A. 2d 363 (1957) and has unfortunately been continued with increasing vigor in *Eutaw Enterprises, Inc. v. Mayor and City Council of Baltimore*, 241 Md. 686, 217 A. 2d 348 (1966) and *Shifflett v. Baltimore County*, 247 Md. 151, 230 A. 2d 310 (1967).[1]

In my concurring opinion in *Stevens v. City of Salisbury*, 240 Md. 556, 573, 214 A. 2d 775, 785 (1965), I indicated my distress at the Court's approval of its prior decision in *Grant* and expressed the hope that the *Grant* decision would be overruled by the Court as soon as possible or, at least, strictly limited to the facts in the *Grant* case. As indicated, neither hope was realized.

In my concurring opinion in *Stevens*, I quoted at some length from the "dissenting" opinion[2] of Judge Van Voorhis

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[1] By coincidence, by the operation of our general practice of sitting in panels of five judges, I did not sit in either Eutaw Enterprises, Inc. v. Mayor and City Council of Baltimore or in Shifflett v. Baltimore County. I would have dissented in both cases had I sat.

[2] As pointed out in Note 1 in the concurring opinion in the Stevens case, the Van Voorhis opinion is not really a "dissenting" opinion as there was no majority opinion in the Harbison case.

of the Court of Appeals of New York in *Harbison v. City of Buffalo*, 4 N.Y. 2d 553, 564, 176 N.Y.S. 2d 598, 606, 152 N.E. 2d 42, 52 (1958), in which my views on this extraordinary doctrine of the constitutionality of the elimination by legislative provision of established non-conforming uses by the use of an "amortization" period in the statute, but without provision for the payment of just compensation, are fully articulated by Judge Van Voorhis. Again, I need not repeat these views here. When the right to use private property for a lawful use *vests* — as the right has, in my opinion, in this case — the *only* constitutional way that vested right may be eliminated by the State or its political subdivisions against the will of the property owner is by the exercise of the power of eminent domain and the payment of just compensation. As Mr. Justice Holmes aptly stated in 1922 in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 160, 67 L. Ed. 322, 326:

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. * * * When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States."

Quite apart from our obligation as I see it to protect Shifflett's property rights under the provisions of the Maryland Constitution, to fail to require payment to Shifflett for the deprivation of his right to continue to use part of the subject property for his lawful use is, in my opinion, contrary to the public interest.

MOTION FOR REARGUMENT

In The
Court of Appeals of Maryland

September Term, 1968

No. 7

Edward Minor, et al.
and
Conway Robinson, et al.,
Appellants,

v

Cecil E. Shifflett, et al.,
Appellee.

Appellee, Cecil E. Shifflett, et al., by Richard D. Payne, Esq., and Robert A. DiCicco, Esq., his attorneys, moves pursuant to Maryland Rule 850, for reargument of his appeal, and in support thereof respectfully shows:

Introduction

1. The appeal in this cause was argued before this Court on the 3rd day of December, 1968.

2. On January 15, 1969, this Court rendered and filed its decision in favor of the Appellant against the Appellee, reversing the judgment of the Circuit Court for Baltimore County.

3. The Appellee seeks reargument upon the following grounds:

A. That the Court erred in ruling that the record was devoid of substantial supporting facts as to error in original zoning.

B. That the Appellee has been surprised by the establishment of a new criteria for rezoning; that in addition to

a showing of error in original zoning there must be a showing by the proponent of the rezoning that there would have been a reasonable probability of a different zoning classification had the zoning authorities been aware of the error.

C. The Appellee wishes to be heard on constitutional issues which could not have been raised prior to the decision of the Court of Appeals because the Appellee had not appealed the decision of the Circuit Court for Baltimore County. Constitutional issues sought to be raised are:

1. The decision of the Court of Appeals of Maryland deprives the Appellee of his property without due process of law, and is a violation of the equal protection clause of the 14th amendment of the United States Constitution and Article 23 of the Maryland Declaration of Rights.

2. That the decision of the Court is in violation of the Appellee's rights under Article I, Section 10, Constitution of the United States.

ARGUMENT I

That the Court Erred in Ruling that the Record Was Devoid of Substantial Supporting Facts as to Error in Original Zoning.

The ruling that the record is devoid of substantial facts as to the error in original zoning is based on an erroneous conclusion of facts not before this Court.

The erroneous conclusions of fact are as follows:

1. The Court has erroneous stated that: "The area was zoned as residential, however, from the adoption of the zoning in Baltimore County in 1945." See page 2 Opinion.

Counsel for Appellee has thoroughly reviewed the transcript of all the proceedings and has been unable to locate this fact in the record.

2. The Court has concluded that there was no showing of access to rail or port facilities from the property to be

rezoned, which is alleged to be an inherent requirement to an M-H zone. See page 9 Opinion. A quick referral to E. 43 and Appellee's Brief page 6 will reveal that the property is bound on the south by the B & O railroad and the Patapsco River.

3. The Court has failed to grasp the fact that the record is clear regarding the utter lack of awareness on the part of Mr. Gavrelis and his staff of the extensive nonconforming use of the Appellee's junk yard. In view of this the Appellee respectfully directs the attention of the Court to the poignant fact that Mr. Gavrelis and his staff were prejudiced against the use of any land for junk yards in Baltimore County. At E. 60-67 the following appears:

> "Q. As to this particular location, and the advisability of a junk yard there, please give us your opinion. A. We do not recommend the establishment of a junk yard here. Again, going back to whatever data we have, we can find no indications from either our maps or our air photos of any extensive junk-yard activity on the subject property at all.
>
> We have air photos, going back to 1943, which is perhaps an unfair air photo, there wasn't too much (T. 79) junking, very obviously, during the war years, with heavy demands for scrap steel of all kinds, nor were there many cars coming on the junk market.
>
> In 1959, again, another series of air photos, doesn't even indicate, in a three-dimensional photo, any distinguishable junk-yard activities on the property.
>
> The 1943 photo had no foliage, as the 1959 photo, dated December 1959, and this date coincides approximately with the planning staff date, there is no foliage obviously in these, but the photo does indicate a fairly dense growth of trees on the majority of this property, in 1959.
>
> (Mr. White) We would offer it in evidence.
>
> Q. (Mr. Baldwin) From my own knowledge, you can't see down through the trees, into the area. A. I beg your pardon, sir. Obviously generally you can't when you have a dense foliage, but with exterior—

Q. If I go over my house, and my wife's car is parked under the trees, I can't see the car unless I get down to one side and look underneath the trees. (T. 80) A. But an exterior photo is a little different from an eye-level view, in the sense you are getting two diagonal views and putting two side views into one common view; the illusion, and it is an illusion, is somewhat different, and exaggerated.

Q. (Mr. White) Whether the photographs show it, whether they had them there before, whether they never had them before, do you recommend a junk yard on this location at the present time? A. No.

Q. Tell us what is in the general area, zoningwise, what area are we covering zoningwise, in your thoughts, in which you reach this conclusion; that is to say, is there something a half mile away, or a quarter of a mile away that is different than a residential area? A. The map was adopted by the Council and established generally residential potentials, half-acre and more principally acre-lot zoning in this area, with several exceptions. They have established industrial zoning.

Q. (Mr. Baldwin) This 1-B map on the Western Area, looking at it, shows one little tiny piece of (T. 81) B-L. These are all R-40 and a few R-20 tracts? A. Yes.

(Mr. White) We would like to offer the map in evidence.

(Received in evidence as Protestants' Exhibit A.)

(Mr. Baldwin) The official zoning map.

Q. (Mr. White) Mr. Gavrelis, when you say that the M-H zoning, I forget the expression you used the most liberal? A. The most permissive.

Q. Tell us what would be permissible there?

(Mr. MacDaniel) Please don't lead him.

(Mr. White) We offer in evidence the Baltimore County Zoning Regulations.

(Mr. Baldwin) The regulations speak for themselves. We are aware, and the Court is aware, if it is

rezoned to M-H, he can use it for any use permissible in an M-H zone.

Q. (Mr. White) Are you familiar with Wrights Mill Road, can you tell us anything about Wrights Mill Road, how wide it is? (T. 82) A. Only from our base map material, which is reasonably accurate.

Q. How wide is Wrights Mill Road, approximately? A. Adjacent to this property?

Q. Yes, in the immediate location.

(Mr. White) Don't worry about it.

CROSS EXAMINATION

By Mr. MacDaniel:

Q. Mr. Gavrelis, had you been aware, in 1962, when the land use map was adopted, that there was a 1,000-car to 1,200-car operation of a junk yard in this particular area, would this have changed your mind in reference to how you would have adopted the particular zoning in this area? A. No, in the sense that I personally do not adopt a map. I, as a staff member, make recommendations to the Board, and they decide, and subsequently the County Council decides. So I don't know whether I can answer your question.

Q. Would your recommendation have been the same had you realized in 1962 that there was a 1,000- to a 1,200-car operation in this area? (T. 83) A. Again, in 1962 the staff work, the Board work, in connection with this map, had been completed. The date of the adoption of this map by the Planning Board was perhaps a year preceding that.

Q. (Mr. Baldwin) September of 1961? A. I don't have the date.

Q. The map was adopted by Council, I think, in December of 1961, vetoed by the County Executive, and subsequently readopted by the County Council. A. I think the date of the adoption of the map by the Planning Board was February of 1961, and, again, I would have to say that we were not at all aware of 1,000 cars being there. If we were aware of this, and this was in 1961, I would—

(Mr. White) I object, because there is no testimony there were 1,000 cars there in 1961, and he has been asking about 1962. So just to get the record straight—

(Mr. MacDaniel) I will amend my question.

(Mr. Baldwin) In order to save time — I don't know what figure he gave in 1960, I think he (T. 84) said 600 cars in 1960.

Q. (Mr. MacDaniel) In 1960, if you were aware in 1960 there were 600 junked automobiles being used on this property, as a junk yard, would this have changed your recommendation in reference to the type of zoning that you would have recommended? A. In terms of my own personal reactions, I would have continued to recommend that since the property enjoys residential zoning, that any status it had would remain on a nonconforming use basis, if it had such a status, and industrial zoning potential has not been established on this property.

Q. Had you been aware at that particular time a law would be passed that would outlaw a legal nonconforming use in a residential area, would this have changed your recommendation? A. I don't know. This came out—

Q. It could have changed your recommendation? A. Again, I would say at that time planning objective would have been consistent, reflecting on this, I think from a staff position, we would have maintained (T. 85) a consistent position of recommending the retention of residential zoning feeling that a nonconforming use establishes really no vested right, and the whole theory broadly of zoning is that in time nonconforming uses pass away.

From my own viewpoint, I can only speak for myself now, in this reflective thing, no, I think I or the staff would maintain a position of recommending residential zoning, and possibly the elimination, in time, of this use.

Q. And putting somebody out of business?

Q. (Mr. Baldwin) Mr. Gavrelis, this regulation outlawing junk yards in residential zones, wasn't that a planning staff bill, so to speak? A. No. It is my recollection, Mr. Baldwin, is that this obviously was heard by the Planning Board as a proposed amendment, but I think the impetus for such legislation came from the very definite recommendations of Mr. Rose, the Zoning Commissioner, who was experiencing rather drastic problems throughout the county with illegal junk yards.

Q. You were certainly aware of the push for this legislation? (T. 86) A. Yes, absolutely.

Q. When did that start? A. My recollection, Mr. Baldwin, if that has a date of 1962.

Q. It was November of 1962 when the County Council passed the bill. A. I would suspect this is something that happened during calendar 1962, as a matter of memory, and we ourselves had worked on the map the year preceding. It is awfully hard to answer all of these questions.

Q. What I want to know, at the time of adoption of this map, or your recommendation on this map, were you aware there was going to be, or there was a press for legislation to outlaw junk yards? A. At the time the Board acted, I don't think we were aware it would be forthcoming.

Q. (Mr. MacDaniel) Hadn't Mr. Rose brought this to your attention, and discussed it with you prior to that? A. Prior to its going to the Board, and prior to action by the county, absolutely, but my recollection, (T. 87) Mr. MacDaniel, is that this happened subsequent to action on the part of either the staff or the Planning Board, on the Western Area Map itself.

Q. This was adopted in November of 1962? A. By the County Council, a legislative body, but the Planning Board itself, I recall its adoption of the map, its final recommendation was I think February of 1961, so there is almost a two-year gap.

Q. Isn't it true that Mr. Rose was making this recommendation as far back as 1959? A. I don't so recall. Again, I am not trying to be cute, I don't know.

Q. In your planning staff, you have a Mr. Minor, is that correct? A. No, that is not correct.

Q. Did Mr. Minor have anything to do with the adoption of the land use map for this particular area, was he consulted in reference to it. A. Indeed I don't recall whether Mr. Minor was a member of the Board at the time this map was adopted, or not. I think he was, but I don't know.

(T. 88) Q. Do you recall, yourself, whether or not his advice was sought in reference to the area that he lived in? A. In terms of specific instances?

Q. In terms of the land use map for that area. A. Yes, I think there is a rather constant reliance on the part of the staff and the Board on let us say the expertise, the knowledge, the awareness of what exists, and what doesn't exist, in a Planning Board member's zoned area.

Q. Was Mr. Minor acquainted there was a junk-yard operation going on in that area? A. I don't so recall now.

Q. You don't recall him telling you that? A. No.

Q. Mr. Gavrelis, isn't it true that a statement had been made by you on other occasions that you don't know what you are going to do with the junk in Baltimore County today? A. By me?

Q. Yes. A. No. By others, yes.

(T. 89) Q. Isn't it true you don't know what you are going to do with the junk in Baltimore County today? Don't you have a chaotic condition existing on junk automobiles? A. I can say that this problem of junked automobiles, very obviously is a problem, yes, and it is a formidable one.

Q. You don't have enough junk yards in Baltimore County today, do you? A. I don't know whether the supply and demand should be satisfied, uniquely, in Baltimore County, or is an area problem. Obviously

there are problems with respect to handling junked vehicles of all kinds. I think it doesn't obviate the basic principle that what zoning seeks to do is to have appropriate uses in appropriate places.

Q. When you figured appropriate uses in appropriate places at the time you were working on the recommendations for the land use map, did you at that time take into consideration what junk yards were in specific areas for the needs of Baltimore County? A. In terms of an input-output study, no, there was no precise analysis or market economic study made (T. 90) with respect to how many vehicles were being junked, and ultimately where they were being accommodated, no.

Q. There was no effort made at that time to determine anywhere in this particular area whether there was a need for any junk yards, by your staff? A. No, there was not. Again the point being that junk yards do not seem to be, as a personal impression, the kind of activity that serves a very localized neightborhood." (sic.)

4. The Court erred in not giving consideration to the failure of Mr. Gavrelis and his staff to make the appropriate studies and findings with regard to the need for an outlet for storage of junk cars in Baltimore County contrary to the spirit enabling act set forth in Article 66B, Section 3 et seq Article 25 Annotated Code of Maryland.

5. The Court has erroneously concluded at Page 9 of the Opinion that the Appellees' argument was that the presence of the nonconforming use in the area should be evidence of error in original zoning. The thrust of Appellees' argument is that the failure of the planners to be aware of such an overwhelmingly obvious nonconforming use in this area and their failure to evaluate said use with respect to the needs of not only the immediate area but the needs of the County as a whole was a severe abuse of their function and amounts to a flagrant error in the establishment of the original zoning. It would be a great miscalculation to evaluate land use for junk yards in terms of a small

part of urban Baltimore County. For by its very nature a junk yard is the final resting place for dead machinery that has served a huge population.

The law is clear that the Court of Appeals cannot reverse the findings of the Board and the lower court unless there has been an erroneous interpretation of the law and where there has been a finding without substantial evidence to sustain said finding, thereby tending to show that the decision of the Board and lower Court was arbitrary and capricious. *Shell Oil Co. v. Mayor and City Council*, 225 Md. 463, 171 A. 2d 234 (1961), *Crowther, Inc. v. Johnson*, 225 Md. 379, 170 A. 2d 768 (1961).

The decision of the Board of Appeals was not arbitrary or capricious. On the contrary the overwhelming impression made by all the live witnesses before the Board of Appeals, concurred in by the Honorable John N. Maguire, reveals that the lower tribunal made a special effort to reconcile the effect the reclassification would have on the problems of congestion in the streets, safety, health and general welfare, adequate light and air, overcrowding of the land, undue concentration of population, suitable location of transportation, water, sewage, schools, parks and public requirements. The evidence clearly reflects that the change in classification was made with the utmost consideration of the character of the district and the peculiar suitability of the land for that particular use, with the view to conserving the value of the surrounding land and to encourage the most appropriate use of the land throughout the county. The Board and the Court can do no more than to evaluate and explore the testimony presented with a view toward establishing and insuring the aforementioned purposes which constitute the very heart of the power to enact zoning. Article 66B, et seq. and Article 25A, Annotated Code of Maryland.

ARGUMENT II

The Appellee Has Been Surprised by the Establishment of A New Criteria for Rezoning: That in Addition to a Showing of Error in Original Zoning There Must Be A

Showing by the Proponent of the Rezoning That There Would Have Been A Reasonable Probability of a Different Zoning Classification Had the Zoning Authorities Been Aware of the Error.

The law prior to the Opinion on this matter, with regard to circumstances necessary to justify amending a zoning ordinance, was that there has to be either a mistake in the original zoning or that the character of the neighborhood has changed to such an extent to justify the rezoning. *Wakefield v. Kraft*, 202 Md. 136, 141, 96 A. 2d 27 (1952). It was on this principle that the Appellee based its argument for sustaining the lower decision. However, this Court, at page 9 of the Opinion, has totally surprised the Appellee, in that it has added a further criteria, namely, that not only must there be a showing of an error in original zoning, but also a showing that if the planners were aware of this error, such knowledge would have made it reasonably probable that a different classification would have resulted.

The establishment of this new test is a great surprise to the Appellee, who was not prepared to argue this point and did not in fact argue it in the appeal. Judge Barnes in his opinion in *MacDonald v. Board of County Commissioners*, 238 Md. 549, 210 A. 2d 325, 340 (1965) outlined the infamous history of the present change of mistake rule.

Part III

"The majority states, in effect, that rezoning can only be sustained when there is "strong evidence of mistake" in the original zoning or where there is "a substantial change in conditions" in the neighborhood. This "mistake-change in conditions" rule came into the Maryland law by way of dicta of our predecessors and in a rather oblique way. The "change in conditions" concept seems to be first stated, without any supporting authority, in Northwest Merchants Terminal v. O'Rourke, 191 Md. 171, 60 A. 2d 743 (1948).

> It was repeated in a restricted form in Cassel v. Mayor and City Council of Baltimore, 195 Md. 348, 358, 73 A. 2d 486, 488 (1950). This dictum was then expanded by additional dicta in Kracke v. Weinberg, 197 Md. 339, 79 A. 2d 387, 391 (1951) which added "mistake in original zoning" to a "change in the character of the neighborhood" — and so the Maryland Rule of "mistake-change in conditions" was born. It was entirely judicially conceived and delivered. It had no legislative assistance. It has had a rapid and, to my mind, unhealthy growth in the Maryland law."

The Appellee submits that this Court has erroneously introduced an additional test for rezoning much in the same way as the "mistake or change rule" had its conception. It is unfair to the Appellee to change the former criteria for rezoning and add this new and difficult burden after the argument has been made. It is respectfully requested that the cause be remanded for further testimony to enable the Appellee to meet the burden of this new test.

ARGUMENT III.

The Appellee Wishes To Be Heard on Constitutional Issues Which Could Not Have Been Raised Prior to Decision of the Court of Appeals Because the Appellee Had Not Appealed the Decision of the Circuit Court for Baltimore County.

The Appellee in this matter prevailed both at the Board of Appeals and the Circuit Court for Baltimore County. The Appellant has taken this appeal. Because the Appellee was defending the action of the Board it logically did not and could not attack the decision on constitutional grounds. The Appellee would like to be heard on the constitutional grounds of whether the rule that to support a rezoning there must be shown a change in the conditions of the neighborhood or a mistake in the original zoning is a violation of the Appellee's rights under the United States and Maryland Constitutions. The decision of the Court of Appeals operates to deprive the Appellee of his property

without due process of law in violation of the 14th amendment of the United States Constitution and Article 23 of the Bill of Rights of Maryland. The effect of the decision is to take the property of the Appellee and deprive him of the use that has been legal since 1932 years before any zoning had occurred in Baltimore County, thereby condemning the property by zoning rather than the use of eminent domain.

The Appellee would also like the opportunity to be heard on the question of whether he is a victim of an ex post facto law, a violation of Article 1, Section 10 of the United States Constitution. The Appellee bases this contention of the fact that Section 200.16 of the Baltimore County Zoning Regulations is unconstitutional as being ex post facto in that it makes conduct that has been legal since 1932 subject to fine or imprisonment for violation thereof.

Wherefore, the Appellee prays that he be granted an opportunity to reargue the appeal upon the aforementioned basis or in the alternative that he be permitted to have the decision remanded to the Board of Appeals for taking further testimony consistent with the establishment of the true factual picture enabling proper review in order to avoid an unjust taking of the property of the Appellee.

CONCLUSION

For the foregoing reasons, it is urged that this motion be granted.

Respectfully submitted,

RICHARD D. PAYNE,

ROBERT A. DICICCO,
26 W. Pennsylvania Avenue,
Towson, Maryland 21204

Attorneys for Appellees.

Dated: February 14, 1969.

[Certificate of Service.]

PETITION FOR STAY OF MANDATE

In The
Court of Appeals of Maryland

September Term, 1968

No. 7

Edward Minor, et al.
and
Conway Robinson, et al.,
Appellant,

v.

Cecil E. Shifflett, et al.,
Appellees.

Cecil E. Shifflett, et al. by Richard D. Payne and Robert A. DiCicco, their attorneys, move, pursuant to Maryland Rule 850 b that the issuance of the mandate in this case be stayed pending decision of movant's motion for reargument, filed February 14, 1969. The grounds of the motion are as follows:

1. The opinion of this court was filed on January 15, 1969, and the mandate of this court would normally issue on February 14, 1969, pursuant to Maryland Rule 876.

2. Appellees motion for reargument was filed on February 14, 1969 and the Court cannot possibly evaluate the Motion before the issuance of the mandate which will be February 14, 1969.

3. The Appellees attorneys believe that the grounds of said motion are substantial and that the motion will require discussion, which cannot take place until after the expiration of the normal time for issuance of the mandate.

4. Issuance of the stay in this case will not in any way harm any of the Appellants since it is undisputed that

none of the Appellants can see the rezoned property in question or have been adversely effected by the present use thereof.

RICHARD D. PAYNE,
ROBERT A. DICICCO,
26 W. Pennsylvania Ave. (21204)
Attorneys for Appellees.

[Certificate of Service.]

Court of Appeals of Maryland
Annapolis, Md. 21404

March 4, 1969

Richard D. Payne, Esq.
Attorney at Law
26 W. Pennsylvania Avenue
Towson, Maryland 21204

Dear Mr. Payne:

The Court has considered your motion for reargument, together with the motion for stay of mandate, both filed on February 14, 1969, in the case of *Edward Minor, et al. and Conway Robinson, et al. v. Cecil E. Shifflett, et al.*, No. 7, September Term, 1968, and, for your information, said motion for reargument was denied yesterday.

Also considered by the Court, your motion to stay issuance of mandate pending review by the Supreme Court of the United States was granted on March 3rd and we are enclosing a copy of the Order of Court filed.

Very truly yours,
J. LLOYD YOUNG, Clerk.
By: JAMES H. NORRIS, JR.,
Chief Deputy.

JHNjr/jr
Enclosure
cc: George W. White, Jr., Esq.

ORDER

In The
Court of Appeals of Maryland

September Term, 1968

No. 7

Edward Minor, et al.,
and
Conway Robinson, et al.,
v.
Cecil E. Shifflett, et al.

Upon consideration of the motion for stay of mandate filed in the above entitled case, it is this 3rd day of March, 1969,

ORDERED by the Court of Appeals of Maryland that the mandate be, and it is hereby, stayed pending application for review of the decision of this Court to the Supreme Court of the United States, and until final decision by that Court, unless otherwise ordered by this Court or by the Supreme Court of the United States, provided such application for review be timely filed in the Supreme Court.

/s/ HALL HAMMOND,
Chief Judge.

APPENDIX B

STATUTES

AN ACT, to provide for elimination of junk yards and open dumps from all residential districts, and the elimination

and future prohibition of open dumps everywhere in the county, by amending Section 101, by adding Section 200.16, and amending Sections 256.4 and 270, and by repealing Section 410 of the Baltimore County Zoning Regulations (1955).

Section 1. Be it enacted by the County Council of Baltimore County, Maryland, that Section 101, paragraphs headed "Junk Yard" and "Open Dump", of the Baltimore County Zoning Regulations (1955), are hereby amended to read as follows:

Junk Yard: Any land used commercially or industrially for storage or for sale of scrap metal, waste paper, rags, or other junk, and including non-commercial storage of non-operating or non-drivable motor vehicles, dismantling or storage of such vehicles or parts thereof, or used machinery, and regardless of whether repair or any other type of commercial operation occurs, but excluding scrap for use in manufacturing processes on the premises, or waste materials resulting from such processes OR RESULTING FROM THE CONSTRUCTION OR ELIMINATION OF FACILITIES FOR SUCH PROCESSES.

Open Dump: Any land publicly or privately owned, other than a sanitary landfill, on which there is deposit and accumulation, either temporary or permanent, of any kind of organic or inorganic refuse, including but not limited to waste materials, waste products, waste paper, garbage, empty cans, broken glass, rags, and all other kinds of organic or inorganic refuse BUT EXCLUDING SCRAP FOR USE IN MANUFACTURING PROCESSES ON THE PREMISES, OR WASTE MATERIALS RESULTING FROM SUCH PROCESSES, OR RESULTING FROM THE CONSTRUCTION OR ELIMINATION OF FACILITIES FOR SUCH PROCESSES.

Section 2. And be it further enacted, that a new Section 200.16 be and it is hereby added to the Baltimore County Zoning Regulations (1955) to read as follows:

ARTICLE 2—ZONES: USE, HEIGHT AND AREA REGULATIONS

R. 40 Zone—Residence, One-Family

Section 200—USE REGULATIONS

Uses prohibited:

200.16—Junk yards and open dumps as defined in Section 101. Any existing junk yards in this or any other residential zone, and any existing open dumps in any zone shall be completely eliminated not later than two years after the date of effectuation of this amendment.

Section 3. Be it further enacted, that Section 256.4 of the Baltimore County Zoning Regulations (1955) is hereby amended by deleting the following uses: "Open dump" and "Reduction of dead animals, fish, garbage, or offal".

Section 4. Be it further enacted, that Section 270 of the Baltimore County Zoning Regulations (1955) is hereby amended by deleting the following use: "Open dump".

Section 5. Be it further enacted, that Section 410 of the Baltimore County Zoning Regulations (1955), title "Open Dumps", be and it is hereby repealed.

Section 6. And be it further enacted, that this Act shall take effect forty-five days after its enactment.

Read and Passed this 1st day of October, 1962.

By Order:

R. Bruce Alderman, Secretary.

Presented to the County Executive, for his approval this 2nd day of October, 1962.

R. Bruce Alderman, Secretary.

Approved and Enacted: October 3, 1962.

Christian H. Kahl,

County Executive.

I hereby certify that Bill No. 140 is true and correct and will take effect on November 17, 1962.

Dale Anderson,

Chairman, County Council.

October 19, 1962.

BALTIMORE COUNTY ZONING REGULATIONS

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Section 503—Violations

503—Any violation of regulations, or of any final written order made or adopted pursuant to these regulations shall be a misdemeanor, punishable by a fine not to exceed one hundred dollars or by imprisonment not to exceed thirty days, or both fine and imprisonment. Any person who shall violate such regulations, restrictions or final order shall be deemed guilty of a separate offense for every day that such violation shall continue.

504—In addition to all other remedies provided by law, the Zoning Commissioner, or any person whose property is affected by any violation, including abutting and adjacent property owners, whether specially damaged or not, may maintain an action in, the Circuit Court for the County for an injunction enjoining the erection, construction, reconstruction, alteration, repair or use of buildings, structures and land in violation of Zoning Regulations and restrictions adopted pursuant to these Regulations.

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